In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-162

WARREN J. WEITZEL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief of Respondent/Intervenor Shell Oil Company

In Opposition To Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals abused its discretion under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), when, although not specifically requested to do so, it failed to remand this case to the National Labor Relations Board for the taking of further evidence, evidence not demonstrated to have been material or reasonably omitted from prior proceedings?

STATEMENT OF THE CASE

In 1969, Petitioner Warren J. Weitzel's ("Weitzel") employment was terminated by Shell Oil Company ("Shell")[1] under a Shell retirement program. Weitzel filed a complaint with the National Labor Relations Board ("the Board"), alleging that Shell had committed unfair labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended ("the Act"), in connection with his retirement. Among other things, he sought to recover and, by virtue of an order issued by the Board on November 30, 1970 (186 N.L.R.B. 941), affirmed by the Ninth Circuit Court of Appeals on June 28, 1972 (461 F.2d 1264), did recover, backpay for the period between his retirement and his reinstatement.

On October 31, 1974, a hearing was held before an NLRB Administrative Law Judge in a supplemental proceeding to determine the amount of backpay, if any, due Weitzel as a result of his termination. Shell was represented at that hearing by its attorney, counsel for the Board's General Counsel was there, and Weitzel was there.[2] Counsel for the General Counsel claimed that Weitzel was entitled to a minimum of $31,181.67 in backpay, plus interest at six percent. Shell insisted that it owed Weitzel nothing, not only because during the period between his retirement and his reinstatement he had received monthly pension benefits plus payments from the Shell Provident Fund totaling

1. Shell was the respondent in the original proceeding before the National Labor Relations Board and it was granted leave to participate as an intervenor in the proceedings before the Ninth Circuit Court of Appeals.

2. While Weitzel was not represented by counsel at this hearing, he knew that he could have been because he had had his own counsel in the prior unfair labor practice proceeding.

$43,807.17, but also because he had obtained and then quit suitable interim employment without justifiable cause, thereby incurring a willful loss of earnings. (Tr. Vol. I, pp. 3-5, 10-13, 22; Vol. II, pp. 3, 7.)[3]

With respect to its claim of willful loss of earnings, Shell established that on March 19, 1969, two days after the backpay period began, Weitzel found and accepted employment as a pipefitter at Mare Island Naval Shipyard. While Weitzel had been a surveyor at Shell for seven years prior to his retirement, for the 14 years prior to that—ten as a journeyman and four as a helper—he had been a pipefitter. His hourly wage at Mare Island was 84% of his hourly wage at Shell. With his monthly pension from Shell he was actually making 110% of what he had been making at Shell. (Tr. Vol. II, pp. 34, 38, 60-61; App. D, pp. 1-2.)

Nevertheless, he quit his job at Mare Island effective June 2, 1969. Mare Island's records disclosed that Weitzel told them he quit because he "wish[ed]" employment commensurate with his training and education as a surveyor, although he apparently had nothing in mind at the time. The following day, Weitzel told Shell's official Roberts that he had two reasons for quitting his job. One was that he had taken the pipefitter job at Mare Island with the basic desire of getting into surveyor-type work (a fairly incredible statement since surveyors at Mare Island were being paid 80% of what pipefitters were getting), but he felt it would take him three or four years and he didn't want to wait that long. The other reason he gave was that he was being pressured to work overtime because of repairs on a submarine that had recently sunk and acceptance of this

3. Citations to "Tr. Vol. I [II or III] ...." refer to the record on appeal filed with the Ninth Circuit Court of Appeals; "App. A [B, C, or D]" refer to the Appendices to Petitioner's Petition For A Writ of Certiorari.

overtime would create income tax problems for him. In the next three years, Weitzel earned a total of only $104.96, and Shell had only one inquiry about him from a prospective employer, an inquiry in the middle of 1970 (a full year after he left Mare Island) from Contra Costa County where Weitzel had applied for a job, not as a surveyor, but as an Engineering Aid. (Tr. Vol. II, pp. 14-17, 33-34, 38-39, 59-60, 75; App. D, pp. 1-2.)

Shell contended that with 14 years' experience as a pipefitter, Weitzel should not have left his job as a pipefitter at Mare Island because of the possible income tax increases that might flow from staying on that job, because of some vague desire to find surveyor's work with nothing specific in mind, or because of some other reason of personal convenience, and that he incurred a willful loss of earnings by so doing. The Administrative Law Judge agreed:

> "[The pipefitter] position was pointedly appropriate to his own occupational background. The total situation fails to reveal that justifiable cause existed for Weitzel to quit his employment. His voluntary cessation of gainful work in the slender hope of securing preferred survey employment, with undenied overtones that leisure rather than labor would afford financial advantage, marks the action as willful loss of earnings deemed to reduce further backpay by the measure of nonmitigation." (App. D, p. 7, ll. 10-16)

Counsel for the General Counsel and Weitzel on his own behalf immediately filed exceptions to that decision with the Board, contending in essence (1) that the Administrative Law Judge applied the wrong standard of law applicable to abandoning interim employment; (2) that the finding of the Administriatve Law Judge that Weitzel incurred a willful loss of earnings when he quit his interim employ-

ment was not supported by the record; and (3) that the Administrative Law Judge erroneously placed the burden of proof with respect to willful loss of earnings on the General Counsel. No request was made by either Weitzel or the General Counsel that the Board reopen the hearing for additional evidence and no suggestion was made that material evidence had, for whatever reason, not been brought forward. Indeed, the only reference to "other evidence" is found in a cryptic exception to the Administrative Law Judge's finding that pressure to work overtime was a factor in Weitzel's decision to quit Mare Island which Weitzel said was "not supported by evidence available to [him] at the hearing." (Tr. Vol. I, pp. 31, 38-42.)[4]

The Board reviewed the Administrative Law Judge's decision and, in its Decision and Order of May 29, 1975, agreed that Weitzel's quitting of interim employment was unjustified under the circumstances and that his projected interim earnings should be considered as an offset in computing backpay due him from Shell:

> "We are in agreement with the Administrative Law Judge that Weitzel's quitting of his interim employment at Mare Island Naval Shipyard was unjustified under the circumstances and that his projected interim earnings, had he retained his employment, should be considered, along with the early retirement benefits

4. On January 26, 1975 Weitzel wrote a lengthy letter to the Board complaining of the credibility of Shell's witnesses and of the Administrative Law Judge's lack of common sense, and pointing out that he had not been represented by counsel although acknowledging that he knew he could have been. On January 31, 1975, the Board returned this letter to him, advising him that it would not accept it as a bill of exceptions since it failed to comply with the Board's rules. Weitzel then filed his exceptions dated February 7, 1975. It is this January 26 letter, however, which is not and never has been a part of the formal record, that Petitioner repeatedly cites to the Court in his Petition for a Writ of Certiorari as his bill of exceptions.

> he received from Shell, in computing the amount by which the backpay due him from Respondent was offset." (App. C, p. 2, ll. 7-12)

Recomputing backpay, the Board concluded that Weitzel was entitled to a net of $128.64. (App. C, pp. 2-3.)

Weitzel appealed to the Ninth Circuit, this time with an attorney representing him. He made precisely the same contentions to the Ninth Circuit which had been made by the General Counsel to the Board. Again, Weitzel argued that the Administrative Law Judge (and now the Board) applied the wrong standard of law applicable to abandoning interim employment; that the finding of the Administrative Law Judge (and now the Board) of a willful loss of earnings was not supported by the record; and that the Administrative Law Judge (and now the Board) erroneously placed the burden of proof with respect to willful loss of earnings on him. (Petitioner's Opening Brief to the Ninth Circuit, pp. 8-36.)

Weitzel did not argue to the Ninth Circuit that he had been inadequately represented by the General Counsel (or, indeed, that the General Counsel had a duty to represent him at all); he did not claim that material evidence had been omitted from the record that would have affected the outcome of the Administraitve Law Judge's and the Board's decisions; and he did not request that the court remand the matter to the Board for the purpose of taking additional evidence. Instead, in his Reply Brief his attorney advised the Ninth Circuit that, although it had the authority to order a new hearing if it considered the record inadequate: *"That is not Weitzel's argument here.* We believe the record is ample to show that [the Mare Island pipefitter's job] was not 'substantially equivalent' to surveying

and that, hence, Weitzel was not required by law to retain it." (Petitioner's Reply Brief, p. 20, emphasis added.)

The Ninth Circuit concluded that the record was more than adequate to uphold the Board's decision that Weitzel had voluntarily terminated suitable interim employment without just cause, and on February 12, 1977 it so held. On April 12, 1977 it denied Weitzel's Petition for Rehearing and for Rehearing En Banc and, on April 20, 1977, judgment was entered enforcing the Board's Supplemental Order.

Weitzel is now before this Court urging it to issue a Writ of Certiorari based on the assertion that the case involves two important questions of federal law that have not been, but should be, settled by this Court. The first question, he says, is whether a Court of Appeals abuses its discretion in denying a remand for additional evidence under § 10(e) of the National Labor Relations Act when that evidence is material, and when the failure to adduce it was the result of gross negligence of the government counsel presenting the case. The second question, he says, is whether a Court of Appeals must pass expressly on a request for a § 10(e) remand rather than denying the request *sub silentio.*

Neither of these questions, however, has anything to do with this case.

ARGUMENT

I. Petitioner Never Requested the Court of Appeals to Remand This Matter Under § 10(e)

Section 10(e) of the Act states in pertinent part:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is

> material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record." (29 U.S.C. § 160(e).)

While Weitzel's Petition to the Court is replete with jurisprudential outrage that the Ninth Circuit could fail to remand this matter to the Board to adduce additional evidence in light of what he feels was the obvious negligence of the General Counsel, the fact remains that he never asked the court to do so until *after* the Ninth Circuit had determined to enforce the Board's order. (Petitioner's Petition for Rehearing, p. 8.)[5] At that point, the boat had sailed.

5. Because Weitzel never applied to the Ninth Circuit for leave to adduce additional evidence, his reference to *NLRB v. Indiana and Michigan Electric Company*, 318 U.S. 9 (1938); *NLRB v. Pittsburgh Plate Glass Company*, 313 U.S. 146 (1941); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942); and *NLRB v. Donnelly Garment Company*, 330 U.S. 219 (1947), is meaningless, for in each of those cases a petition to remand under § 10(e) had been formally submitted to the appellate court. The appellate courts in *Pittsburgh Plate Glass* (*supra* at 155), in *Southport* (*supra* at 102-104), and in *Donnelly Garment Company* (*supra* at 225), *denied* the petitions to remand and those denials were upheld by this Court. In *Indiana and Michigan Electric Company, supra*, the Sixth Circuit granted the employer's § 10(e) petition to remand an unfair labor practice proceeding to the Board in which the employer had been charged with, and found guilty of, assisting a company-dominated union in opposition to unionizing efforts by the IBEW. The employer sought to offer evidence (which had developed *subsequent* to the unfair labor practice hearing) concerning, among other things, the arrest and conviction of two of the Board's key witneses for dynamiting the employer's facilities in an effort to force the employer to support the IBEW; attempts by Board agents and officials (including the trial examiner) to coerce the employer into withdrawing recognition from the independent union; and the effect of the IBEW's lawlessness on the employees. The Sixth Circuit found that the proffered evidence was material to the question of the substantive due process of Board proceedings as well as the basis of the Board's conclusion that the independent union was company-dominated. This Court agreed:

> "Dynamiting or display of force by either party has no place in the procedures which lead to reasoned judgments. The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence, and it is proper that courts and administrative bodies so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies." 318 U.S. at 29.

Weitzel was at the supplemental hearing before the Administrative Law Judge. He never asked to testify, he never asked to make a statement, and he never asked to put in documentary evidence that he now says is "material". (Tr. Vol. II, pp. 7, 10, 74, 78.) Yet the General Counsel gave him an opportunity to speak and the Administrative Law Judge listened to him. (Tr. Vol. II, p. 78.) He never suggested to the Administrative Law Judge that there was additional evidence he wanted in the record, witnesses he needed to call, or records that should be inspected. While he knew that he could be represented by separate counsel, he never stated that he wanted separate counsel, complained that he did not have separate counsel, or asked for time in which to have separate counsel appear on his behalf.

Following the Administrative Law Judge's adverse decision, Weitzel filed exceptions with the Board. (Tr. Vol. I, pp. 31-32.) He did not claim he had witnesses he had wanted to call and, other than an allusion to "evidence available to [him]" at the hearing, he did not suggest that he had material evidence that should have been included in the record. (Tr. Vol. I, p. 31.) He did not claim that he had been poorly represented by the General Counsel, and he did not ask the Board to reopen the hearing for *any* reason.

When the Board concurred with the Administrative Law Judge, Weitzel then secured an attorney and appealed to the Ninth Circuit. Nevertheless, neither he nor his attorney advised the Ninth Circuit that material evidence had been omitted from the proceedings below, that the General Counsel had handled the matter incompetently, or that a remand under § 10(e) of the Act was imperative. On the contrary, what he told the Ninth Circuit was that all of the evidence in the record supported his position that pipefitting work at Mare Island was not suitable interim employment, that Shell hadn't carried its burden of proving that it *was* suitable employment, that it was Shell's responsibility to call Weitzel as a witness and put Weitzel's records (assuming that there were any) into evidence, and that Shell's failure to call Weitzel as a witness or put Weitzel's papers into evidence compelled an inference to be drawn against it. (Petitioner's Opening Brief, pp. 22-25, 36-42, 44-45; Petitioner's Reply Brief, pp. 1-5.)

Weitzel now says that in his Reply Brief to the Ninth Circuit he "argued in the alternative that there ought to be a § 10(e) remand in line with the [Third Circuit's] decision . . . in *Swinick v. NLRB* (1975) 528 F.2d 796." (Petition for Writ of Certiorari, p. 8.) Even if he had done that, it would not have been appropriate to raise that issue for the first time by way of reply. But he didn't even do that. His Reply Brief speaks for itself. After spending twenty pages disputing Shell's analysis of the record, Weitzel remarked:

> "If this Court considers that the record is inadequate to determine whether the Mare Island job was more burdensome, if this Court concludes that the record should be augmented by testimony from Weitzel in this regard, it has the authority to order a new hearing for that purpose. *That is not Weitzel's argument here. We believe the record is ample to show that it was not 'substantially equivalent' to surveying and that, hence, Weitzel was not required in law to retain it.* (Point I Opening Brief). But if the Court deems otherwise, then Weitzel, as his Exceptions state, is ready to testify. . . .
>
> "If this Court considers it necessary to take additional evidence on any issue raised below, the issue of whether the interim job was 'substantially equivalent' to the surveying job denied him, the issue of whether, after leaving the interim job he did or did not seek other work, or any other issue, then we respectfully request that the Court consider this to be a motion for an order remanding the case to the Board for the purpose of taking additional evidence. *But we repeat, that we do not believe such an order to be necessary. There is ample recorded evidence here* to warrant and mandate reversal of the Board's decision and the entry of an order directing Shell to make restitution to him in accord with the Backpay Specifications." (Petitioner's Reply Brief, pp. 20-21, emphasis added.)

That is not an argument "in the alternative"—or in any other fashion—for remand under § 10(e) of the Act; that's not even a request for a remand, let alone a petition for remand setting forth the evidence to be adduced at a new hearing, the materiality of that evidence and the reasons it was not introduced at the original hearing. It is nothing more than a suggestion (followed immediately by a *disclaimer*) that if the Ninth Circuit felt the record inadequate to make a determination on the suitability of interim employment, then the Court could reopen the matter. The problem for Weitzel is that the Ninth Circuit agreed with him that it *wasn't* necessary to reopen the record. It found that there was ample evidence in the record to reach a decision,

and that evidence supported the Board's decision, not Weitzel's contentions.[6]

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6. Weitzel's suggestion that the facts of this case are similar to those in *Swinick v. NLRB,* 528 F.2d 796 (3rd Cir. 1975) and that, accordingly, the Ninth Circuit's decision conflicts with that of the Third Circuit is frivolous. In *Swinick,* the petitioner had specifically moved the court for a remand order under § 10(e); she had described in detail the additional evidence which she would proffer; and she had made an indisputable showing of materiality. The court also concluded that Swinick had reasonable grounds for not presenting her evidence earlier based on the fact that she had been involved in a complicated unfair labor practice proceeding (not a backpay proceeding); that she was unfamiliar with Board procedures; that she had been expressly assured by the General Counsel's office that it would handle the case; that she provided the General Counsel with a list of witnesses who should be called, including coworkers and union officials; *and* that at the hearing she vigorously attempted to present evidence:

> "A review of the transcript of the hearing demonstrates that petitioner, like the Board, felt that the General Counsel had failed to introduce key evidence. Consequently, petitioner sought to call her own witnesses and present her own evidence. Petitioner moved for a continuance in order to gain time to subpoena the union officials and to enforce the subpoena against Marlene Kimbell. The administrative law judge denied the motion. She also attempted to place in evidence the tape transcripts, but because she did not understand the procedure for authentication, she was unsuccessful. Finally, petitioner sought to place into evidence her time records but was also unsuccessful in this attempt. Under these circumstances, we conclude that there were reasonable grounds for the failure to adduce the aforementioned evidence at the hearing." (425 F.2d at 301, footnotes and citations omitted.)

As discussed, *supra* at page 9, Weitzel did none of these things. Indeed, far from being in conflict with *Swinick,* this case is so unlike *Swinick* that Judge Hufstedler, on whose lone dissent and suggestion of remand Weitzel now relies, stated at oral argument before the Court of Appeals in this case that the court did not need to hear argument on the *Swinick* issue because this case just wasn't a *Swinick* case and the court understood that.

II. The Court of Appeals Did Not Abuse Its Discretion Under § 10(e) Because There Was No Showing That Any Evidence Weitzel Had Was Material or That He Had Reasonable Grounds For Not Presenting It Sooner

Even assuming that Weitzel's comments in his Reply Brief could have been construed as a timely request for a remand under § 10(e) of the Act, the Court of Appeals did not abuse its discretion in declining to remand because Weitzel made no showing that the evidence he claimed he had was material to the issues involved or that there were any grounds—reasonable or otherwise—for not presenting it sooner.

(A) THERE WAS NO SHOWING THAT WEITZEL'S "ADDITIONAL EVIDENCE" WAS MATERIAL BECAUSE NO EVIDENCE WAS IDENTIFIED

Section 10(e) authorizes Courts of Appeals to remand a matter to the Board only if, among other things, the additional evidence sought to be introduced is material to the issues involved. *Southport Petroleum Co. v. National Labor Relations Board,* 315 U.S. 100, 104 (1942). In his briefs to the Ninth Circuit, and indeed in his Petition to this Court, Weitzel makes no showing that the additional evidence he says exists is material to this case. He simply concludes that it is because he lost: "It is obvious that the evidence which petitioner wanted to present was material as its very absence was the reason for the decision below." (Petition for Writ of Certiorari, p. 11.)

That's pure sophistry and Weitzel knows it. The fact that the Administrative Law Judge, the National Labor Relations Board and the Ninth Circuit decided against him doesn't mean that there was material evidence which someone (anyone) failed to place in the record. It can just as

easily be concluded that there wasn't any such evidence and *that's* why it isn't in the record.[7]

In any event, the evidence that Petitioner says he wanted to give is patently *not* material. He says that he wanted to testify (but didn't) that he worked at Shell as a land surveyor, that he worked at Mare Island as a pipefitter on repairs to submarines, that he was 56 years old at that time, and that pipefitting work is arduous. (Petition for Writ of Certiorari, p. 9, n.2.) None of this is material for the simple reason that it is already in the record.[8]

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7. Despite Petitioner's claims to the contrary (Petition for Writ of Certiorari, pp. 9, 10 and 11), neither the Board nor the Ninth Circuit criticized the General Counsel for failing to proffer "material and essential" evidence because there was nothing before them to suggest that such evidence existed.

8. Weitzel worked as a surveyor at Shell: Tr. Vol. II, pp. 60-61; App. D, p. 2, ll. 20-23. Weitzel worked as a pipefitter on Mare Island: Tr. Vol. II, p. 34; App. D, p. 1, ll. 39-40. Weitzel was 56 years old at the time of employment on Mare Island: Tr. Vol. II, pp. 74, ll. 15-18. Pipefitting work is strenuous: Tr. Vol. II, p. 65, ll. 16-18. The notion that repairs were being made to a "submerged" submarine is the fanciful invention of Weitzel's attorneys. What Weitzel told Roberts was that repairs were to be done to a submarine that had recently sunk, not that the repairs were being done while the submarine was "submerged." (Tr. Vol II, p. 17.) In fact, Weitzel's statements to the Board, the absence from the record of which he now purports to bemoan, showed that at the time he quit his job at Mare Island the work he was doing was neither arduous nor on a submarine, which may have been one of the reasons that both he and the General Counsel decided he should not take the stand. Weitzel, of course, knows that. His attorneys, if they did their homework, know it too. It was in this context that Shell pointed out (Shell's Brief to the Ninth Circuit, pp. 26-27) certain things Weitzel—now free from the rigors of cross examination—claimed as "facts" before the appellate court were not in the record. (See, reference to Shell's point at Petition for Writ of Certiorari, p. 11.)

(B) WEITZEL MADE NO SHOWING THAT HE HAD REASONABLE GROUNDS FOR NOT PRESENTING HIS "EVIDENCE" SOONER

Weitzel says that the reason he didn't testify and the reason he didn't submit his documentary evidence was because the General Counsel mishandled the case. Citing his January 26, 1975 letter to the Board, Weitzel laments that "NLRB officials informed [him] that it was unnecessary to present witnesses and that the trial judge would not allow any testimony;" that they explained to him that "if anything brought up by [Shell] was in need of refutation, a continuance could be, and would be requested, and the necessary witnesses could be called for further sessions;" that he had compiled and documented "pages of information" on his reasons for leaving Mare Island which he'd given to the NLRB office; that no one called him to testify regarding Roberts' "false testimony;" and that if he had been allowed to testify he would have given "true and accurate" testimony that differed from that of Shell's witnesses, Sheridan and Listoe. (Petition for Writ of Certiorari, pp. 7-8.)[9] Weitzel says that his adds up to "being steamrollered by inadequate government counsel who either put the interests of their agencies ahead of the individuals for whom they assume an adversary role or ignore the individuals' interests because they do not sense a responsibility to protect them." (Petition for Writ of Certiorari, p. 10.) We suggest that, on the contrary, all that after-the-fact hyperbole, unsupported by any specifics about who those witnesses would have been and what that evidence would have shown, adds up to nothing at all.

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9. As noted previously, p. 5, n. 4, despite Petitioner's penchant for citing this letter, the Board refused to accept it as a bill of exceptions and returned it to Weitzel. Petitioner's formal exceptions dated February 7, 1975, which were accepted by the Board, contain none of these assertions.

Weitzel's claim that NLRB officials told him he couldn't have witnesses at the hearing is preposterous. What he said in his letter to the Board was:

> "About three weeks before the hearing I began to arrange for possible witnesses to be present at the hearing in order to support my position if I were called to testify. When Region 20 officials became aware of this I was informed this was not only unnecessary, but the judge would probably not allow any such *testimony as I had in mind anyway, that testimony concerning the specific matter before the judge—the validity or invalidity of the backpay specification—would be all that would be permitted.*" (Tr. Vol. I. p. 33, emphasis added.)

There is nothing incorrect, misleading or improper about that. To this day, there hasn't been the slightest suggestion that the "possible witnesses" to whom Weitzel alluded in fact had anything to contribute to a backpay proceeding.

Nor does the fact that the General Counsel elected not to call Weitzel as a witness or put in the information Weitzel says he compiled lend credence to his charge of gross incompetence. There can be many reasons for not calling Weitzel to the stand or putting in the information, not the least of which may have been the General Counsel's belief that Weitzel and his information had nothing to offer in the way of probative evidence or that he didn't want Weitzel subject to cross-examination.[10] Be that as it may, Weitzel directly addressed the Administrative Law Judge on several occasions throughout the hearing, including a colloquy

10. For example, Messrs. Sheridan and Listoe testified to the general availability of pipefitter openings during the entire backpay period. The General Counsel having reviewed all of the documents Weitzel had presented to the Board conceded that Weitzel was not looking for pipefitter's work and Weitzel did not object that that was untrue. (Tr. Vol. II, p. 68.) Thus any evidence that Weitzel had that he was looking for other work was irrelevant to the theory on which this case was tried.

off the record which his Petition suggests was in rebuttal to testimony from two of Shell's witnesses (Petition for Writ of Certiorari, p. 8), but which his January 26, 1975 letter makes clear consisted of a discussion of the difficulties in getting the Social Security Administration to credit backpay to his account. (Tr. Vol. I, pp. 36-37.) He never asked to testify, offered any of the "evidence" he now repeatedly alludes to, suggested that witnesses be called, or requested a continuance.

What Weitzel is really doing here is second-guessing a tactical decision made by the General Counsel, a decision which, from all appearances at the hearing, he concurred in at the time. Even assuming that a litigant's strategical regrets should be grounds for the issuance of a writ of certiorari, Weitzel cannot be heard to complain when he and his attorney cheerfully endorsed the General Counsel's decision all the way through the Ninth Circuit:

> *"In a backpay proceeding the sole burden on the General Counsel is to show gross amounts of back pay due a discriminatee. Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 534 (1943). If the discriminator pleads the affirmative defense of willfull loss by failure to retain substantially equivalent interim employment, it is its burden to prove it by a preponderance of the evidence. Hence, the procedure uniformly followed in a backpay proceeding is that General Counsel puts into evidence the backpay Specification and he then rests. If the employer then fails to meet its burden of proving willfull loss, an order of backpay issues. The General Counsel *never* has been required to put the discriminatee on the stand. The Respondent, on the contrary, always has, and when it fails to, inferences adverse to it are drawn from that failure.
>
> "But, because a backpay hearing is not a strictly adversary proceeding, but a truth-finding one as well, the Board, as a 'public service' also *produces* the discriminatee. It brings him to the hearing. But it does

not put him on the stand. It makes him available for the discharging employer to examine him (where it can make him available), but it has no burden to examine him, and it doesn't." (Petitioner's Opening Brief to the Ninth Circuit, pp. 44-45, emphasis in the original.)

Weitzel accepted the strategy at the hearing, until he lost. He defended that strategy before the Ninth Circuit, until he lost. Now he argues to this Court that it was all the General Counsel's fault. However great the General Counsel's burden of "public responsibility" (Petition for Writ of Certiorari, p. 14), that does not mean that each time a charging party loses he is free to pass the buck to the General Counsel and start again. "If I don't win this way, please let me have a second chance to try another" may be the wish of all unsuccessful litigants; it is not a sufficient basis on which to request issuance of a writ of certiorari.

III. A Court Does Not Have To Expressly Pass On a Request for a Remand Under § 10(e) When No Such Request Is Properly Made

With respect to Petitioner's concern over whether or not a Court of Appeals must expressly pass upon remand requests under § 10(e) of the Act or whether such requests may be denied *sub silentio*, under the circumstances of this case, the question is clearly academic. Since no request for remand under § 10(e) was ever made by Weitzel except perhaps in the most off hand and indifferent manner, he can hardly complain if the Ninth Circuit accorded his "request" no greater significance than he did himself.[11]

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11. Even if the issue had some substance, the answer seems clear. There is nothing in the Act nor in the concept of due process that requires a court to discuss its denial of a remand application under § 10(e) of the Act when it already has expressed its reasons for enforcing a Board order. *Southport Petroleum Co. v. National Labor Relations Board*, 315 U.S. 100, 104 (1942).

CONCLUSION

Respondent/Intervenor Shell Oil Company submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated: August 26, 1977

Respectfully submitted,

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